No. 138, Original

IN THE
SUPREME COURT OF THE UNITED STATES

No. 06-A1150

STATE OF SOUTH CAROLINA,
Applicant,

v.

STATE OF NORTH CAROLINA,
Respondent.

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On Motion for Leave To File Complaint

REPLY BRIEF IN SUPPORT OF APPLICATION OF THE STATE OF SOUTH CAROLINA FOR A PRELIMINARY INJUNCTION

To the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice for the Fourth Circuit:

South Carolina respectfully submits this reply in support of its application for a preliminary injunction to maintain the status quo in this matter pending the Court's review on the merits.

In an attempt to moot South Carolina's need for preliminary relief, North Carolina represents to the Court that an injunction is unnecessary because it will voluntarily maintain the status quo "for at least the next two years." NC Prelim. Inj. Opp. at 5. North Carolina then asserts its right to continue to authorize such transfers during that time — and on an expedited basis — whenever it perceives a need to do so. The inconsistency of those representations fully justifies the preliminary injunction that South Carolina seeks.

Since South Carolina filed its application with this Court, North Carolina has taken steps to evade — rather than to address — the complaints raised by South Carolina. First, North Carolina appears to have tabled (for the time being) the long-pending request of

Union County to increase the amount of water that it can transfer out of the Catawba River by 13 million gallons per day ("mgd"). Second, North Carolina's Assembly amended the interbasin transfer statute — hoping to "mitigate fighting between . . . [the] states"[1] — but left in place the aspects of the law that have given rise to this dispute.[2] Changing the method by which North Carolina, as the upstream State, determines what water should be left to South Carolina, the downstream State, will not protect South Carolina's equitable rights in the Catawba River. At a minimum, this Court should require that, until an equitable apportionment of the Catawba River is achieved, North Carolina cannot unilaterally authorize any additional interbasin transfers out of the Catawba River. Instead, such transfers should occur (if at all) only on application to, and approval by, a neutral third party, such as a Special Master appointed in this case to make appropriate recommendations to the Court. Such action would completely alleviate the harms that North Carolina claims would result from an injunction, while also providing South Carolina with adequate protection from further unilateral and harmful transfers by North Carolina.

A. Enjoining Further Transfers Without Some Neutral Third Party's Permission Would Eliminate The Harms That North Carolina Claims Would Result From An Injunction

Contrary to North Carolina's opposition, South Carolina has no objection to an injunction with reasonable limitations. In South Carolina's view, it would be entirely proper for the Court to enjoin North Carolina from authorizing any additional interbasin transfers from the Catawba River without express permission from the Special Master appointed in this matter. That would allow the Special Master to consider the impact of

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[1] *Thursday, Aug. 2, 2007, at the North Carolina General Assembly*, The Fayetteville Observer (Aug. 2, 2007), *available at* http://www.fayobserver.com/article_ap?id=108689.

[2] As of the date of this filing, the amended interbasin transfer statute, which would replace the current § 143-215.22I with a new § 143-215.22L, remains subject to disapproval by the Governor.

any proposed transfer on uses of the Catawba River in South Carolina, which North Carolina has thus far ignored, and impose appropriate conditions on any such transfer during times of inadequate flow. Importantly, such an injunction would eliminate the harms that North Carolina claims would result from a "blanket" bar on additional transfers. In the event North Carolina proposes a transfer that would not invade South Carolina's rights in the Catawba River, North Carolina can be afforded a full opportunity to persuade the Special Master to lift the injunction as to that particular transfer.

By contrast, there is no reason for this Court to defer to the claimed "technical expertise" (NC Prelim. Inj. Opp. at 6) of the North Carolina Environmental Management Commission ("EMC"). Indeed, it is well settled that the proper apportionment of an interstate stream "is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive." *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938). Rather, as South Carolina noted in its opening brief seeking leave to file a complaint, this case must be settled "on the basis of equality of right," recognizing "the equal level or plane on which all the States stand." *Connecticut v. Massachusetts*, 282 U.S. 660, 670-71 (1931) (internal quotation marks omitted); *see* Brief of the State of South Carolina in Support of Its Motion for Leave To File Complaint at 10 ("SC Br.").

North Carolina's request for deference to its own agency is particularly inappropriate given that it was North Carolina's insistence on unilateral decisionmaking that precipitated this dispute. North Carolina's view is apparently that South Carolina (and the Court) should simply trust it to make equitable use of the waters of the Catawba River — without a framework for resolving interstate disputes, and without it having any incentive to give due regard for the impact of its consumptive uses on South Carolina and her citizens. That stance is untenable, as this Court has repeatedly held. *See, e.g.*,

Wyoming v. Colorado, 259 U.S. 419, 466 (1922) (rejecting the proposition that "a state rightfully may divert and use, as she may choose, the waters flowing within her boundaries in [an] interstate stream, regardless of any prejudice that this may work to others having rights in the stream below her boundary").

B. The Proposed Injunction Would Provide South Carolina With Important Protection From Further Harmful Transfers While An Equitable Apportionment Is Determined

Despite its careful suggestions that no new transfers are likely to be authorized in the next two years, North Carolina continues to threaten South Carolina with additional harm from its mounting unlawful and unilateral interbasin transfers. As this Court has explained in another original action, "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief." *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923); *see also Missouri v. Illinois*, 180 U.S. 208, 243 (1901) (same); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 930-31 (1975) (affirming grant of preliminary injunction barring enforcement of town ordinance despite the absence of pending enforcement proceedings against plaintiffs).

1. North Carolina's assurances of no new transfers are critically incomplete. First, at the time South Carolina was preparing its initial application in this Court, North Carolina's EMC was considering a request from Union County to increase its maximum authorized daily transfer out of the Catawba from 5 mgd to 18 mgd. *See* Attach. A. Indeed, Union County has already completed a draft Environmental Impact Statement, which is a substantial step in the permitting process. *See id.* Yet, in opposing South Carolina's request for a preliminary injunction, North Carolina reports — without offering any details — that this proposed transfer is no longer pending because Union County is "exploring [other] options." NC Prelim. Inj. Opp. at 3-4; NC App. 3a (Fransen Decl. ¶ 7). Importantly, North Carolina does not foreclose the possibility that Union County will determine — after

this Court rules on South Carolina's motion for a preliminary injunction — that those other options are less preferable than a transfer out of the Catawba River, leading it to reinstate its partially completed application for an interbasin transfer.

Second, North Carolina's suggestion that no additional transfers will be authorized in the next two years because of the "lengthy and arduous process" (NC Prelim. Inj. Opp. at 8) for obtaining such authority ignores that the North Carolina interbasin transfer statute specifically authorizes the North Carolina Secretary of Environment and Natural Resources to grant a "temporary transfer" without resort to the ordinary permitting process "[i]n the case of water supply problems caused by drought." N.C. Code § 143-215.22I(j).[3] Such "temporary transfers" under the statute can last up to a year. *See id.* (authorizing initial six-month period with option to renew for an additional six months). North Carolina thus has an available means to circumvent the "lengthy and arduous" permitting process in a manner that makes a preliminary injunction an important remedy in this litigation. North Carolina, moreover, has now declared that a portion of the Catawba River Basin in North Carolina is experiencing "extreme drought" conditions, with the remainder experiencing "severe drought" conditions. *Compare* North Carolina Drought Management Advisory Council, http://www.ncdrought.org (visited Aug. 19, 2007) (showing drought areas), *with* North Carolina Division of Water Quality, *General Map of the Catawba River Basin*, http://h2o.enr.state.nc.us/basinwide/whichbasincatawba.htm (visited Aug. 19, 2007) (showing map of Catawba River Basin in NC). *See also* Assoc. Press, *Official: S.C.'s drought status could be upgraded to severe soon* (Aug. 21, 2007), http://www.wilmingtonstar.com/article/20070821/APN/708210776. These conditions make such

[3] The provision for temporary transfers in the recently amended version of the statute does not differ materially from the existing version. *See* H.R. 820, § 3, 2007-2008 Session (N.C. 2007) (adding § 143-215.22L(q)).

"temporary transfers" sufficiently likely to be authorized during the pendency of this litigation that the threat of irreparable harm to South Carolina from further interbasin transfers is imminent.

2. North Carolina is simply wrong to assert that the interbasin transfers it has authorized thus far have had only insignificant effects. North Carolina attempts to make that showing by pointing out that the most recent transfer it authorized of 10 mgd to Concord and Kannapolis constitutes "less than 0.4% of the average daily flow of the river into South Carolina." NC Prelim. Inj. Opp. at 3. North Carolina is thus claiming an "average daily flow" of more than 3,800 cubic feet per second ("cfs"). Yet, as South Carolina has alleged here, the "average" flow of the Catawba River masks wide fluctuations — due to both drought and non-drought causes of inadequate flow, *see* SC App. 16 (Badr Aff.) — when the flow of the Catawba River is far less than average. In times of extreme drought, flows have dropped as low as 132 cfs. *See* SC App. 21 (Badr Aff.). Indeed, the minimum daily average flow measured for each day of the year for the Catawba River between 1942 and 2006 was typically as low as 500-700 c.f.s. *See id.* Those historical patterns are critically important in light of North Carolina's existing authorized transfers. As North Carolina's Morris Declaration makes clear, to date North Carolina has authorized the transfer of at least 72.5 mgd (approximately 116 cfs) out of the Catawba River.[4] In times of extreme drought when the river is in a flow of less than 500 cfs, such transfers in North

[4] South Carolina alleged in its complaint that North Carolina had authorized the transfer of at least 48 mgd from the Catawba River, based on its information that, in addition to the 43 mgd North Carolina has authorized through the permit process established by the interbasin transfer statute, transfer of at least 5 mgd was grandfathered by the statute. *See* Compl. ¶¶ 20-21. North Carolina's Morris declaration makes clear, however, that an additional 24.54 mgd was grandfathered by the interbasin transfer statute, *see* N.C. App. 49a, for a total of 72.54 mgd that North Carolina has authorized to be transferred from the Catawba River. The harms identified by South Carolina are therefore even greater than originally understood.

Carolina would represent nearly 25% of the flow of the river — an extraordinary amount that can cause devastating effects of the types described in South Carolina's complaint and motion papers. *See* Compl. ¶ 17; SC Br. at 5-6; Application at 2-3, 5-6. Thus, when it matters most to South Carolina, North Carolina's authorized interbasin transfers are by no means insubstantial. As this Court has stressed, "Can it be gravely contended that there are no preventive remedies, by way of injunction or otherwise, against injuries not inflicted or experienced, but which would appear to be the natural result of acts of the defendant, which he admits or avows it to be his intention to commit?" *Missouri v. Illinois*, 180 U.S. at 243.

* * *

South Carolina is likely to succeed on the merits of its claim that an equitable apportionment is warranted and that North Carolina has no right under federal law to divert substantial portions of the Catawba River in a manner that unfairly diminishes South Carolina's equal rights in the river. South Carolina will suffer irreparable harm in the absence of an injunction, as North Carolina has plainly threatened additional unilateral and unlawful interbasin transfers from the Catawba. Moreover, if North Carolina truly does not contemplate authorizing any additional interbasin transfers in the next two years (as it suggests might be possible), North Carolina will suffer no harm whatsoever from the limited injunction that South Carolina seeks. Indeed, the Court need do nothing more than to hold North Carolina to its representation that, "[i]n fact, the status quo will be maintained for at least the next two years." NC Prelim. Inj. Opp. at 5. During that time, the parties may develop a full record before a Special Master, and the Special Master's recommendations may be reviewed by this Court.

Conclusion

For the foregoing reasons and those stated in the application, South Carolina respectfully requests the issuance of a preliminary injunction enjoining North Carolina, absent permission from a Special Master appointed by this Court, from authorizing transfers of water from the Catawba River in excess of those authorized as of the date of the application, thereby preserving the status quo pending resolution of the related original action filed by South Carolina contemporaneously with the application.

Respectfully submitted,

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Interbasin Transfer Certification Status for the Union County

Union County has submitted in February 2005 a draft Environmental Impact Statement (EIS) for a new water reclamation facility and the associated increase in interbasin transfer from the Catawba River Basin to the Rocky River Subbasin. According to the EIS, the proposed interbasin transfer certificate would increase from the currently 5 million gallons per day (mgd) grandfathered amount to an 18 mgd transfer.

- Background Documentation

1. *Draft Environmental Impact Statement for the Northern Union County Water Reclamation Facility and Increase in Interbasin Transfer of Water from the Catawba River Basin to the Rocky River Subbasin (pdf format)* (February 2005)

If you would like to be included on the Division of Water Resource's mailing list to receive information relating to Interbasin Transfers and the Environmental Management Commission's Water Allocation Committee meetings, please click on the link below to send an e-mail request to join the list.
Join the Water Allocation Committee mailing list: join-water_allocation_committee@news.ncwater.org

If you have any questions or comments contact Phil Fragapane at Phil.Fragapane@net or call (919)715-0389.

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